United States Court of Appeals

for the Second Circuit

REPLY BRIEF

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74-2598

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- DANIEL REID and THEODORE E. THOMAS, JR., Appellants.	Docket No. 74-2598

REPLY BRIEF FOR APPELLANT
THEODORE E. THOMAS, JR.

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I

Despite the fact that the Solicitor General confessed error in June, 1973, on the very issue which is before the Court in Point I of Appellant Thomas' brief, and despite the judgment of the Supreme Court vacating and remanding in Hanahan v. United States, 414 U.S. 807 (1973), the Government boldly argues,* without citing any authority, that Hanahan has no precedential value and that it is an open question whether 18 U.S.C. §2114 applies to robberies having no nexus with the postal department. However, the concession and the decision to vacate and remand in Hanahan shows that there was a decision by the Supreme Court on the issue:

> . . . Confessions of error are, of course, entitled to and given great weight, but they do not relieve this Court of the performance of the judicial function. Young v. United States, 315 U.S. 257, 258 (1942). It is the uniform practice of this Court to conduct its own examination of the record in all cases where the Federal Government or a State confesses that a conviction has been erroneously obtained. For one thing, as we noted in Young, 'Our judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of parties', 315 U.S. at 259; Sibron v. New York, 392 U.S. 40, 58 (1968).

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* The Government at 10 n. of its brief asserts that it is obliged to obtain leave of the Solicitor in order to take a position directly contrary to the one taken by the Solicitor General in Hanahan, supra. While the Government's brief at 9-10 reflects that such permission was requested, it conspicuously omits any assertion that such leave has been granted.

II

The Government also argues in Point I that because the amended version of 18 U.S.C. §2114 is not ambiguous on its face, the Court may not look to the legislative history. The ambiguity here is immediately evident from a cursory reading of the original statute and the amended one. Moreover, even were no such ambiguity evident, the Courts are obliged to construe statutes so as not to distort the legislative intent:

> Unquestionably the Courts, in interpreting a statute have some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results or would thwart the obvious purpose of the statute.
>
> (Commissioner v. Brown 380 U.S. 563, 571 (1965))

This is especially so in dealing with a criminal statute, such as here, where judicial construction favors lenity. Bell v. United States, 349 U.S. 81, 83 (1955).

Not wishing to place too much reliance on its weak assertion that the Court here should not consider the legislative history of 18 U.S.C. §2114, the Government next argues that even were the Court to consider the legislative history, it is not clear that Congress intended to confine the statute to postal-related robberies. Out of context, the Government quotes the remarks of Representative Wolcott. The Government fails to set forth the question

which Representative Wolcott was attempting to answer, and the brief colloquoy which ensued. The question put to Mr. Wolcott by Mr. Truax reflects that the intent was that the statute only would apply to postal-related robberies:

> MR. TRUAX: I ask the gentleman (Mr. Wolcott), why we should pass any law placing a penalty of 25 years imprisonment on someone who attacks a postal employee? Why should we not make it apply also to the criminal, to the burglar who enters a person's home? For instance, we have a law that makes life imprisonment mandatory for anyone who burglarizes a bank.
>
> MR. WOLCOTT: Replying to the gentleman from Ohio, I doubt whether the Federal Government would have jurisdiction to enact legislation making it a felony to enter a person's home for the purpose of committing burglary or any other offense. This bill is confined to assaults on Federal law enforcement officers. For that reason I have no objection to it. I do not want to see them federalize all the criminal laws of the States, and the bill does not do it; it merely amends existing law with respect to assault with intent to commit robbery.
>
> MR. TRUAX: Does not the gentleman believe such a law would be a good thing to protect the home of our citizens.
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> MR. WOLCOTT: It might be a good law, but I do not think it would be advisable for the Federal Government to pass such a law unless an interstate question was involved; and I understand that Congress already has passed legislation making it a federal offense for a fugitive from justice to cross a State line. I think that is as far as we should go.
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> (Emphasis added) 79 Cong. Rec. 8205 (1935).

The Government's position that the amended statute was intended to apply to federal law enforcement officials, such as here, is frivolous. It is undisputed that the 1935 amendment was sought solely by the Postal Government. Were this Court to give heed to Representative Wolcott's obvious mistake in terminology - "Federal law enforcement officers" - members of the Postal Department would not be covered by the amended statute. Thus, the Postal Department, would not only fail to benefit from the amendment which it proposed, it would actually be stripped of the protection which the statute previously afforded them. Such an absurd result was obviously not intended by anyone.

Instead, the point which Representative Wolcott was attempting to make in answer to Mr. Truax's question was that principles of federalism would prohibit Congress from extending the statute to State robbery offenses where no Federal interest was involved. While a middle ground position - that the statute be extended to all persons having custody of Government property, would have been an area of proper Federal jurisdiction - such a position was never considered - much less intended here. As the Solicitor General's memorandum reflects, the latter situation is adequately covered by 18 U.S.C. §2112.

III

Relying on United States v. Langone, 445 F.2d 636 (1st Cir. 1971), the Government argues at 21 of its brief that Agent Shea was entitled to the protection of 18 U.S.C. §111 even though he was off-duty at the time of the incident, and even though his intervention did not fall within the purview of his federal official duties as a DEA agent. Langone does not strengthen the Government's position. To the contrary, it weakens it. It was undisputed in Langone that the altercation occurred while the federal officer, an agent of the DEA, was attempting to keep an appointment with an informant. What the defense put in issue was whether the defendant knew that the agent was so engaged at the time of the assault or believed instead that the agent was on his lunch hour at the time. While indicating that the latter situation "might not fall within the performance official duties," United States v. Langone, supra, 445 F.2d at 637, the Court held that the defendant's knowledge that the agent was engaged in his official duties at the time was not an element of the crime under 18 U.S.C. §111.

By contrast here, Agent Shea was acting in a private capacity. The confrontation arose while he was off-duty, getting a haircut during a late lunch hour.

The Government cites the Court to no case where an off-duty agent, acting in an unofficial capacity, has come within

the purview of 18 U.S.C. §111, merely by virtue of the fact that he is a federal officer. The case here not only falls outside the purview of 18 U.S.C. §111, but to hold otherwise would extend federal jurisdiction beyond its permissible limits. See United States v. Archer, 486 F.2d 670, 677-678 (2d Cir. 1973).

IV

The legislative history of 18 U.S.C. §924(c) reflects that this provision was not intended to apply to a prosecution where the underlying federal felony was an alleged violation of 18 U.S.C. §111 or 18 U.S.C. §2114, involving the use of a firearm.

> MR. POFF: For the sake of legislative history, it should be noted that my substitute is not intended to apply to title 18, sections 111, 112, or 113 which already define the penalties for the use of a firearm in assaulting officials, with sections 2113 or 2114 concerning armed robberies of the mail or banks, with section 2231 concerning armed assaults upon process servers, or with chapter 44 which defines other firearm felonies.
>
> (114 Cong. Rec. 22232(1968)).

As this Court observed in United States v. Ramirez, 482 F.2d 807, 814 (2d Cir. 1973), the Poff amendment later became 18 U.S.C. §924(c) in its present form. As stated above, Mr. Poff's reason for not wanting to apply section 924(c) to prosecutions under sections 111 and 2114 involving firearms was that those sections already provided additional penalties based on the use of the firearm. Although it was not articulated by Mr. Poff at that time, additional penalties based on the same prohibited use would violate the double jeopardy clause of the Fifth Amendment. Ex parte Lange, 18 Wall 163 (1874); North Carolina v. Pearce, 395 U.S. 711, 717 (1969). Thus, it was plain error for the Court to

instruct the jury that sections 111 and/or 2114 could serve as the underlying federal felony, necessary to convict under section 924(c)(1).

As appellant Thomas contended in his main brief, it was also wrong to instruct the jury that §2112 could serve as the predicate for such a conviction. The Government argues that because the defendant used the gun during the escape, the defendant's conduct falls within the purview of 924(c)(1). The language of the section 924 and the legislative history indicate that the statute was intended to deter prospective criminals from bringing with them firearms when committing a federal felony:

> MR. POFF: The effect of a minimum mandatory sentence in this case is to persuade the man who is tempted to commit a federal felony to leave his gun at home.

Appellant Thomas was not armed with a firearm** at the time he entered the liquor store. His subsequent disarming of Agent Shea and the possession of Shea's firearm in that regard does not constitute the "use" prohibited by this section.

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* He was armed with an automatic CO_2 pistol.

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